

EXHIBIT V

031505a

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action  
No. 03-12428-WGY

\* \* \* \* \*

BRAUN GmbH,  
Plaintiff,  
v.  
RAYOVAC CORPORATION,  
Defendant.

\* \* \* \* \*

\* MARKMAN HEARING

BEFORE: The Honorable William G. Young,  
District Judge

APPEARANCES:

ROPES & GRAY, LLP (By William L. Patton,  
Esq., Dalila Arguez Wendlandt, Esq. and Lesley F.  
Wolf, Esq.) One International Place, Boston,  
Massachusetts 02110, on behalf of the Plaintiff

DWYER & COLLORA, LLP (By Joseph Ernest  
Haviland, Esq.), 600 Atlantic Avenue, 12th Floor,  
Boston, Massachusetts 02210

- and -  
KIRKLAND & ELLIS (By Mark Pals, Esq. and  
James A. Shimota, Esq.), 200 E. Randolph Drive,  
Chicago, Illinois 60601, on behalf of the  
Defendant

1 Courthouse Way  
Boston, Massachusetts

March 15, 2005

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THE CLERK: All rise. Court is now in session,  
please be seated.

031505a

3 Calling Matter Number 03-12428, Braun v. Rayovac.

4 THE COURT: Good afternoon and welcome. Would  
5 counsel identify themselves.

6 MR. PATTON: Your Honor, Bill Patton from the firm  
7 of Ropes and Gray on behalf of Braun, and with me are my  
8 colleagues, Dalila Wendlandt and Lesley Wolf.

9 And, your Honor, if I might, I would like to  
10 introduce to the Court Don Tobin, the chief patent counsel  
11 at Gillette, and Dr. Wolfgang Vorbeck who's the director of  
12 patents at Braun. Dr. Vorbeck is a member of the European  
13 Union and German patent bar, and this is his first time in  
14 an American courtroom. So, we want to make sure he's  
15 introduced.

16 THE COURT: He is certainly welcome. We have much  
17 to learn from the European patent process.

18 Counsel.

19 MR. HAVILAND: Good afternoon, your Honor. Joseph  
20 Haviland of Dwyer and Collora appearing on behalf of  
21 defendant Rayovac Corporation. With me are Mark Pals and  
22 James Shimota from Kirkland & Ellis both of whom have been  
23 admitted pro hac vice and they will be handling the argument  
24 this afternoon with your Honor's permission.

25 THE COURT: And of course they are certainly

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1 welcome to the bar of this Court.

2 Let me try to tee this up. Here's how I've  
3 prepared for this. I've read the briefs and I commend  
4 counsel for their briefs. They're thorough and they address  
5 the relevant issues. I've read the patents. I've read a  
6 comprehensive memorandum prepared by my law clerk with

031505a  
7 respect to this case. I have consulted but I do not claim  
8 to have read in detail the file wrapper.

9 I could have wished that you people had, I don't in  
10 any way impugn your professionalism, but I could have wished  
11 that you had been more cooperative in limiting the matters  
12 to be construed. And I wonder whether we will get through  
13 everything this afternoon. If we do not, I have some time  
14 tomorrow and maybe we can get through it then.

15 I have this question. Is this a jury case? A  
16 jury?

17 MR. PALS: Yes, your Honor.

18 THE COURT: That's what I thought.

19 So, understand that what we are trying to capture  
20 now is the patent language in readily understandable English  
21 which will be read to the jury in my precharge at the outset  
22 of the case.

23 Now, I recognize that this translation problem is  
24 difficult because under the law -- and this is a hearing to  
25 construe matters as matters of law. As somebody, I think it

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1 was Marilyn Hall Patel of the Northern District of  
2 California, once said, what this is all about is  
3 substituting one set of words for another set, what the  
4 person skilled in the art would understand for what the  
5 patent drafters had to say. But if that's so there's yet a  
6 second translation and that's to go from what one skilled in  
7 the art would understand to what a jury will understand,  
8 substituting yet a third set of words, and I'm going to try  
9 and collapse the two.

10 The last point, and we'll get right to it, is this.

031505a

11 Everything I say here this afternoon is tentative. It's  
12 tentative because I follow what I think is the appropriate  
13 prudential approach to things and that is to refrain from  
14 taking any look at all at the accused device. I'm not going  
15 to. And I'll give you my best shot during the course of  
16 this proceeding. But I cannot under the constitution give  
17 advisory opinions. And this is not the final claim  
18 construction, what is it, the EDS case out of the Southern  
19 District that now you go and settle this but it may have  
20 issue preclusive effects. I'm here to say I don't intend  
21 that today from this afternoon's proceeding. The time where  
22 it will have issue preclusive effects is when one side or  
23 the other, after you've heard what I say today, brings a  
24 motion for summary judgment, of course a motion which I will  
25 bend over backwards to deny because all intendments have to

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1 be drawn against the party making the motion. But to be  
2 intellectually honest I rather doubt, unless I am persuaded  
3 and can explain why I'm persuaded, the things I express  
4 today and perhaps tomorrow are wrong, that the construction  
5 is going to stick and it's going to stick throughout the  
6 trial. But when it's used to resolve something important as  
7 to the case, rather than just talk to you, then it gets  
8 preclusive effect.

9 Last question and we can start. When is this going  
10 to trial?

11 MS. WENDLANDT: October.

12 THE COURT: Thank you.

13 All right. Okay. I propose to proceed in the  
14 following fashion because I think it makes for the most

031505a  
15 effective hearing. I'll call out what, what seem to be the  
16 basic differences. It's the discussion about claim 11 of  
17 the '328 patent and claim, excuse me, claim 1 of the '556  
18 patent. I have read this. And so to, to make your  
19 arguments make sense, I think that in most cases I'll  
20 either, I'm going to propose a construction, and once you've  
21 heard my construction you may ask me any questions about it,  
22 and then we'll hear argument, why isn't that construction  
23 right, why doesn't it make sense. And once, once we've gone  
24 through these first two then I don't particularly care the  
25 order that we go in. I'll go back and forth. I'll let

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1 Braun pick one and then we'll let Rayovac pick one. We'll  
2 get the idea as we work through.  
3 Okay. Now, it seems to me that claim 11 and claim  
4 1, at least this challenged part, this bit about cradle, a  
5 cradle structure adapted to receive a shaving head of a  
6 shaving apparatus, I think you're in agreement that that  
7 must mean the same thing under both these patents. And I  
8 propose the same construction under both patents and here's  
9 my proposed construction.

10 A framework or other resting place adapted to  
11 support or receive a shaving head of a shaving apparatus and  
12 able to receive or retain fluid or both.

13 Mr. Patton, I imagine you would go for that.

14 MR. PATTON: Your Honor, Ms. Wendlandt is going to  
15 speak to the patents.

16 THE COURT: I don't care who does it. Ms.  
17 Wendlandt, go ahead.

18 MS. WENDLANDT: Yes, your Honor, we would agree

031505a

19 with that construction.

20 THE COURT: Fine.

21 what do you folks say? well, I'm really, I have to  
22 tell you, you make this interesting argument about  
23 means-plus-function. But you can pretty much understand  
24 I've rejected that. The word means is not used. The  
25 presumption is strong against that. Let's talk about

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1 what -- and I'm certainly not saying to the jury, oh, we've  
2 got a limitation governed by 35 U.S.C., Section 112,  
3 Paragraph 6. We're talking to a jury here.

4 So what should I say? Or maybe you'll go with  
5 that. We'll move along right smartly then.

6 MR. PALS: Your Honor, with all due respect, I  
7 think what's happened here is you've given quite a bit of  
8 credence to the word cradle. And the word cradle, with all  
9 due respect, appears in this application only as new matter.  
10 It's not a word that appears in the German priority filing.  
11 Obviously, the German priority filing is in German. But on  
12 translation, accurate translation of the German priority  
13 filing, the word cradle doesn't exist.

14 So what's happened here is a new word has been  
15 inserted into the claim language and weight is being given  
16 to that word to broaden the construction.

17 THE COURT: To broaden it? well, that's why I put  
18 in the business about fluid. If it was just, if it was just  
19 cradle there would be something to what you say. But given  
20 what this patent is about, the word framework or other  
21 resting place able to receive or retain fluid or both,  
22 that's a limitation. And then I think an infringing device

031505a

23 would have to meet that limitation. That's what this is  
24 about. It's not just the stand that you put your shaver in.  
25 So, I hear what you say, but it doesn't dissuade me from

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1 what seems to me to make sense here.

2 MR. PALS: I think, your Honor, perhaps I'm  
3 focusing more on the word framework in the language.  
4 Resting place, I think in fairness to what is shown in  
5 there, is some sort of a resting place. It's a particular  
6 structure and a particular shape to that resting place, and  
7 particular attributes are given to what's shown.

8 THE COURT: Adapted to support or receive a shaving  
9 head of a shaving apparatus.

10 MR. PALS: But a framework other than in the  
11 context of this trough-like or dish-like embodiment isn't  
12 described. And that, the framework language is only  
13 creeping into this because of a definition of the 2003  
14 dictionary of the term cradle. And it's --

15 THE COURT: How does it -- what difference -- I  
16 gather I will come to see what difference it makes  
17 downstream. It just seems to capture the idea about what a  
18 cradle is.

19 When I hear cradle, I think of two things. I  
20 suppose now just having grandchildren who are young, I  
21 suppose I think of cradles. And it used to be that cradles  
22 had slat sides, things got flung out of cradles and the like  
23 and could get into them, I guess. But they got flung out.  
24 Now you look at the new Graco cradles and they're virtually  
25 enclosing. They've got pads all around. Might retain



031505a

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1 fluids without any additional language.

2 But another thing that I think of is if you look at  
3 the, the etymology of the word, ships were held in cradles.  
4 And that's, that's really what we're talking about here.  
5 we're talking about something that's going to receive  
6 something.

7 Now, what is a ship's cradle? It's the framework.  
8 It's blocks and the, how you hold a ship when she's in dry  
9 dock. An analogy that sort of commends itself to me here  
10 where we're talking about fluids and the like.

11 MR. PALS: For one thing, if the word cradle is  
12 construed to cover something more than what is otherwise  
13 described in the specification they've inserted new matter  
14 and the claims are invalid. That's the problem we have  
15 here.

16 THE COURT: well, if --

17 MR. PALS: They've said --

18 THE COURT: Wait a second.

19 MR. PALS: I'm sorry.

20 THE COURT: I start with the claims. I guess I'm  
21 not following you as matter of law. I thought what I was  
22 supposed to do was figure out what this language meant. Am  
23 I mistaken?

24 MR. PALS: Of course in a claim construction the  
25 exercise of the idea is to find out what the language meant.

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1 But of course there's the old adage that the claim should be  
2 construed to be valid.

3 THE COURT: Right.

Page 8

031505a

4 MR. PALS: And looking at what we have there in  
5 front of us, we have the German priority filings in which  
6 the German equivalent to the word cradle is not used. We  
7 have U.S. applications that are filed and represented to be  
8 accurate translations of the German applications but now  
9 contain the word cradle. Whether or not the translations  
10 are accurate or were incorrect for some purpose is an issue  
11 for later. But they represented that they were accurate  
12 translations. In other words, they're not adding anything  
13 to these applications that wasn't in the German application.  
14 Therefore, the word cradle can't bring in a bunch of  
15 independent meaning to what is otherwise described.

16 THE COURT: I guess I -- forget cradle, though  
17 cradle certainly has informed my view of things. Suppose it  
18 just said structure. Do you -- will you go for a structure  
19 adapted, et cetera, et cetera, and able to receive or retain  
20 fluid.

21 MR. PALS: Well, as I looked at this claim actually  
22 I looked at it and thought what if the word cradle, which is  
23 an adjective as it's used here and the prosecution history  
24 shows that, but what if the word cradle is not in there.

25 THE COURT: I'm going --

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1 MR. PALS: Now we're talking means-plus-function.  
2 Because we've got a structure with no specified structure  
3 whatsoever.

4 THE COURT: I'm not, I'm sorry, I'm not going for  
5 means-plus-function. We need not waste time here. I've  
6 read the briefs. I reject that as matter of law. That's  
7 not what it is. It's plain. If we want to use the word

031505a

8 structure, you think that makes your means-plus-function  
9 argument better, well, then good luck to you, with the  
10 Federal Circuit, because I'm not going for it.

11 we'll see how -- what if I go back to, I just say a  
12 cradle structure, et cetera, this means a structure adapted,  
13 blah, blah, blah, and able to receive or retain fluid or  
14 both. You're okay with that?

15 MS. WENDLANDT: Yes, we see no difference between  
16 that and what you proposed initially.

17 THE COURT: I don't either. And if you're more  
18 comfortable with the word structure, I'll do structure.

19 MR. PALS: The problem we have is we've given the  
20 jury no real guidance as to what this structure is supposed  
21 to be. I'm okay with, your Honor, to take, go back to your  
22 definition, resting place, I think that's a fair description  
23 of what they were disclosing and what they were talking  
24 about. Adapted to support or receive a shaving head, I'm  
25 fine with that. Able to retain fluid, I'm fine with that.

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1 It's receiving fluid, I'm a little ambiguous as to what it  
2 means to receive fluid.

3 THE COURT: It's not ambiguous to me. Because --

4 MR. PALS: well, does a hose receive fluid, for  
5 example?

6 THE COURT: what's that?

7 MR. PALS: Does a hose -- if we have a bathtub and  
8 a hose going into the bathtub, is the hose receiving the  
9 fluid or is the tub receiving the fluid?

10 THE COURT: I don't know, but I imagine both are.  
11 I mean, fluid comes from a faucet somewhere, runs through

031505a

12 the hose, it receives the fluid, yes. As opposed, for  
13 instance, to a closed container which doesn't get the fluid  
14 into it. Given what this is about, I want the words receive  
15 or retain fluid or both is the way I said it.

16 okay, I think I'm going to go with a structure  
17 adapted. Okay.

18 Now, where do you want to go from there? And we'll  
19 let the, we'll let the proponent of the patent take its next  
20 pick.

21 Let me speak with the clerk a minute.

22 (Whereupon the Law Clerk and the Court conferred.)

23 MS. WENDLANDT: Your Honor, if we're construing  
24 claim 11, which I've projected there on the board, I think  
25 the next claim language in order is cleaning fluid container

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1 as to which I think there is no dispute is a container for  
2 holding fluid.

3 THE COURT: That's right, isn't it?

4 MR. PALS: In the context of the '328 patent  
5 there's no dispute, your Honor; there is as to the '556  
6 patent.

7 THE COURT: I think her comments are limited to the  
8 '328. So would you -- let's go through the '328. I was  
9 trying to save time. But specifically as to '328 there's no  
10 dispute.

11 MS. WENDLANDT: That's right.

12 THE COURT: And your proposed, or the proposed  
13 construction is adopted by the Court.

14 Go ahead. You're doing fine.

15 MS. WENDLANDT: The next claim element is a feed  
Page 11

031505a

16 device for feeding cleaning fluid from the cleaning fluid  
17 container to the cradle. And we propose a relatively  
18 straightforward construction of a mechanism that feeds  
19 cleaning fluid from the cleaning fluid container to the  
20 cradle structure. Rayovac proposes that this be construed  
21 again as a means-plus-function element.

22 THE COURT: Well, I reject that as matter of law.  
23 And with all respect, and I have reviewed the briefs, I  
24 don't think it makes time to make that, take time on that.

25 The specific language, let me look at the patent

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1 here, the specific language is found in claim 11. All  
2 right. Give me the line, would you?

3 MS. WENDLANDT: It is the -- oh, the line number of  
4 the patent?

5 THE COURT: Yes.

6 MS. WENDLANDT: It is column 13.

7 THE COURT: A feed device.

8 MS. WENDLANDT: Yes. Line 32.

9 THE COURT: Now you've lost me. It's line 17,  
10 isn't it? Column 14, line 17?

11 MS. WENDLANDT: Yes. I'm sorry. Yes.

12 THE COURT: Yes. All right.

13 MS. WENDLANDT: Yes. I'm sorry.

14 THE COURT: Give me a moment.

15 Yes, what's the matter, if I reject  
16 means-plus-function, what's the matter with her proposal  
17 there?

18 MR. PALS: Your Honor, Mr. Shimota will be handling  
19 the argument on behalf of the '328 issues.

031505a

20 THE COURT: Yes, all right, Mr. Shimota.

21 MR. SHIMOTA: The problem with it is, your Honor,  
22 actually the dispute we have is precisely where the cleaning  
23 fluid is fed to. The dispute then is whether --

24 THE COURT: Yes.

25 MR. SHIMOTA: -- it actually needs to be fed to the

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1 cradle structure or whether it can be fed to the shaving  
2 head and then to the cradle structure. We think that the  
3 claim language is explicit with regard to the order in which  
4 the cleaning fluid is fed from the feed device and that  
5 claim, that explicit claim language should control, as  
6 required by the claim language itself.

7 THE COURT: And you think it says what?

8 MR. SHIMOTA: It says that the, that the feed  
9 device feeds cleaning fluid from the cleaning fluid  
10 container to said cradle structure. It doesn't say --

11 THE COURT: Oh, I think I'm with you. But I  
12 thought that's what she said. Here's the language I think  
13 we're settling on, for line 17, column 14: A mechanism that  
14 feeds cleaning fluid from the cleaning fluid container to  
15 the cradle structure.

16 Isn't that what you said?

17 MS. WENDLANDT: That's right, your Honor, that's  
18 what we propose.

19 THE COURT: And that's what you said.

20 MR. SHIMOTA: I believe if to the cradle structure  
21 means what it literally means then we would agree with that.  
22 But actually if you read the briefs there is a dispute on  
23 what that language to the cradle structure means, whether it

031505a

24 means actually to the cradle structure or effectively to the  
25 cradle structure. We say that at least with respect to what

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1 the literal claim language means that it means directly to  
2 the cradle structure, it doesn't mean effectively to the --

3 THE COURT: Well, I haven't put in the word  
4 directly. And I don't know as I'll be anymore detailed at  
5 least for now than I am. I hear the argument. But I'm  
6 adopting that construction. I'll say it again. It's a  
7 mechanism that feeds cleaning fluid from the cleaning fluid  
8 container to the cradle structure.

9 All right. Go ahead, let's let them have a chance.  
10 But maybe the logic of what you're doing makes sense. Since  
11 you're going to handle the '328 let's stick with the '328  
12 and you move us along.

13 MS. WENDLANDT: Sure. The next claim element is  
14 said cradle structure being arranged above a fluid level of  
15 the cleaning fluid in the cleaning fluid container during  
16 feeding of the cleaning fluid to the cradle structure.

17 THE COURT: We've got a --

18 MS. WENDLANDT: Which is at column 14, lines --

19 THE COURT: No, I see it.

20 MS. WENDLANDT: Okay. Sure.

21 THE COURT: We've got a dispute about that?

22 MS. WENDLANDT: Your Honor, actually we, we propose  
23 the construction that during cleaning the cradle structure  
24 is above the fluid level of the fluid in the container, and  
25 Rayovac did not propose an alternative construction.

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031505a

1 Therefore, we propose that this construction be adopted and  
2 it is the straightforward meaning of the claim itself.

3 THE COURT: Any objection to that?

4 MR. SHIMOTA: No.

5 THE COURT: All right.

6 MR. SHIMOTA: We have no objection to that.

7 THE COURT: Thank you.

8 MR. SHIMOTA: To the extent that it's not departing  
9 what actually is written in the literal language, we have no  
10 objection to that.

11 THE COURT: well, I'm going to be guided  
12 significantly by the transcript of what we say here. I  
13 think we're in agreement, but I don't want anyone to be  
14 blindsided. You've got a proposed construction. During the  
15 cleaning operation the cradle structure is above the fluid  
16 level of the fluid in the container. That's the cleaning  
17 fluid container, correct?

18 MS. WENDLANDT: Correct, your Honor.

19 THE COURT: Yes. And there's no objection to that.  
20 As I understand this that makes sense to me.

21 MR. SHIMOTA: Yes, it does appear to, I mean, there  
22 are differences and I don't think there's any intent to  
23 depart from the spirit of the actual language and to the  
24 extent there isn't we have no disagreement.

25 THE COURT: Thank you.

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1 MS. WENDLANDT: And again there is, the final claim  
2 element is a drying device and there is no dispute I think  
3 on that issue which is a device to dry the shaver head.



031505a

4 THE COURT: I don't know as that's described. I  
5 mean, I don't know as that's described, device to dry it.

6 MS. WENDLANDT: I'm sorry, I didn't understand  
7 your --

8 THE COURT: Well, I'm saying, I don't know that  
9 that's described in this claim. It's just part of it,  
10 there's got to be a drying device of some sort.

11 MS. WENDLANDT: That's right.

12 THE COURT: And you're all right with that?

13 MR. SHIMOTA: I believe so.

14 Your Honor, if I may make one point of  
15 clarification going back --

16 THE COURT: Please.

17 MR. SHIMOTA: -- to the prior limitation.

18 The opening preamble to their construction says  
19 during cleaning operation. I don't think that is as  
20 entirely accurate and matches with the claim language, it  
21 actually says during feeding of said cleaning fluid to said  
22 cradle structure. And the feeding of the fluid doesn't  
23 necessarily have to mean the cleaning, I wouldn't think. It  
24 could be independent of that. So I think it would be more  
25 accurate to say during the feeding of said cleaning fluid to

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1 said cradle structure, comma, the cradle structure is above  
2 the fluid level of the fluid in a container.

3 THE COURT: You're okay with that, during feeding?

4 MS. WENDLANDT: That's fine.

5 THE COURT: Fine. All right, I will modify it. It  
6 does seem to be more accurate, during feeding the cradle  
7 structure is above the fluid level of the fluid in the fluid

031505a

8 container.

9 All right. Go ahead.

10 MS. WENDLANDT: Your Honor, as far as the '328  
11 patent, I think claim 11 is exemplary of the disputed claim  
12 elements between the parties.

13 THE COURT: So we can move on.

14 MS. WENDLANDT: And I think we can move on to the  
15 '556.

16 THE COURT: Thank you. Then we'll let your side  
17 propose.

18 MR. SHIMOTA: I think there are a few additional  
19 terms, one of which is impeller which is --

20 THE COURT: Yes, in the dependent claim 12, fine,  
21 before we get done with '326 let's, let's do that.

22 I, I thought we ought to explain what an impeller  
23 is. But my explanation is not Rayovac's. So let me try  
24 mine and see what's the matter with it.

25 An impeller, which is a rotating device or member

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1 of a turbine, blower, fan, axial or centrifugal pump. Isn't  
2 that what it is? Since you're taking the lead here. Do you  
3 have any problem with that?

4 MR. SHIMOTA: I don't believe we do, your Honor.

5 THE COURT: And do you?

6 MS. WENDLANDT: Your Honor, we don't have a problem  
7 with that.

8 THE COURT: All right, so we'll adopt that.

9 Anything else on '326 and we'll follow your lead.

10 MR. SHIMOTA: We additionally have the element  
11 bracket which is also disputed.

031505a

12 THE COURT: Bracket?

13 MR. SHIMOTA: Yes, bracket. I believe it's in  
14 claim 18. Yes. Claim 18 of the '328 patent.

15 THE COURT: Just one second. Yes. Yes.

16 MR. SHIMOTA: And there is on that patent a  
17 disagreement between the parties. Rayovac proposes a  
18 specific construction for that term which is geared towards  
19 the intrinsic evidence and the plain and ordinary meaning of  
20 the term. Braun, on the other hand, proposes no  
21 construction for the term.

22 THE COURT: Yes. well, to -- how about this.  
23 Because bracket -- you sort of have to explain what these  
24 things are in a Markman hearing. How about bracket, I just  
25 repeat it and say a bracket or projecting support. That's

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1 what a bracket is. How's that?

2 MR. SHIMOTA: Well, I believe that definition is  
3 based upon the McGraw-Hill Dictionary which is provided by  
4 Braun. And that's taken in the civil engineering context  
5 and we don't think that that is appropriate. If you look at  
6 other civil engineering definitions, for example, the term  
7 cradle, or in the context of the '556 patent, chamber, they  
8 don't make sense. So --

9 THE COURT: But I'm not likely to go for a  
10 definition which requires vertical surface and projecting  
11 horizontally to support a weight as a shape, an L-shaped  
12 structure. There's lots of different brackets, it seems to  
13 me.

14 The clerk points out that the 1996 Dictionary of  
15 Mechanical Engineering includes this support language.

031505a

16           There's all -- that's -- let me hear you further.  
17   why -- what's the matter with the projecting support?  
18   That's simple and straightforward. It will include the  
19   L-shaped bracket that will support a shelf, but it would  
20   also include a clip-type bracket to force something into,  
21   that type of thing.

22           MR. SHIMOTA: Well, I guess I would ask what weight  
23   is being supported and what orientation. Because any  
24   projecting support, in some sense I could argue that a chair  
25   is a projecting support when I sit down on it. And I don't

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1   think that would be what is meant. So I guess in terms  
2   of --

3           THE COURT: That's a good point. I mean, I don't  
4   encompass chair in the universe of things that I think of as  
5   brackets.

6           MR. SHIMOTA: And I think that's the problem with  
7   that definition, and perhaps a mechanical engineer when they  
8   see projecting support they might say I know what that  
9   means. But I think as you rightly pointed out in addition  
10   to explaining what this means to one of ordinary skill in  
11   the art, we also need to translate this to a jury and  
12   perhaps we may not agree --

13           THE COURT: But your proposal is too limited --  
14   limiting, I think. Brackets do, do project these, these  
15   little, I don't know as these shelves have them, but you  
16   know the adjustable bookshelf cylinders.

17           MR. SHIMOTA: Yes, certainly, I've installed those  
18   at college. I know what those look like.

19           THE COURT: Right. But wouldn't you call those

031505a

20 brackets?

21 MR. SHIMOTA: They are. And I think the problem  
22 then with the projecting support notion is, again, is what  
23 is, you know, what is being supported in this particular  
24 device and where is it being supported from. How is this  
25 bracket operating to support.

23

1 THE COURT: All right, that's well put. So let's  
2 look at the language here in claim 18.

3 well, what you say resonates in some respects in  
4 this sense. It perhaps warns me off the use of the term  
5 framework which I got away from in claim 1. Because with a  
6 shaving bracket, some sort of plastic thing that will hold  
7 it in some sort of condition. In some sort of condition's  
8 the wrong word. The bracket holds the shaver, secures the  
9 shaver, in the language of the patent the shaving apparatus.

10 MR. SHIMOTA: Well, I think in that regard, too,  
11 and I think that you're right to point out, I mean, there  
12 needs to be some structural differentiation between the  
13 cradle structure of the '328 patent and the bracket.

14 THE COURT: I see it as different. I mean, for one  
15 thing here's this dependent claim. So, it's an added, in 18  
16 there's an added limitation. We've got the structure that  
17 we've talked about up here and then down at the bottom this  
18 one requires a bracket. And the question is just what word  
19 will we use for bracket.

20 I have to tell you I like projecting support.  
21 That's what holds --

22 MR. SHIMOTA: Well, if I may interject, your Honor.  
23 Respectfully, claim 18 is not a dependent claim, it actually

24 is a separate independent claim. 031505a

25 THE COURT: You're, you're absolutely right. But

24

1 it repeats the language.

2 MR. SHIMOTA: Certainly.

3 THE COURT: And I will construe cradle structure in  
4 18 the same way as I'm going to construe it in 11. But  
5 what's different is the bracket. The bracket has to be an  
6 additional limitation. I'm right on that?

7 MR. SHIMOTA: Oh, that's exactly right.

8 THE COURT: Sure.

9 MR. SHIMOTA: And within this device there must be  
10 additional structure in addition to --

11 THE COURT: Yes. So the question is how shall we  
12 describe it. And their answer a bracket is a bracket I  
13 don't think is good enough. Your answer that a bracket is  
14 an L-shaped thing like something that holds up a shelf is  
15 too limiting. My middle ground, if it is a middle ground,  
16 is it's a projecting support. We don't think of brackets as  
17 the thing that you lock into. That's not a bracket. A  
18 brackets projects. Something rests on it or it grips. It  
19 snaps in. That's a bracket. I just like projecting  
20 support.

21 MR. SHIMOTA: I mean, there was some discussion of  
22 what is fluid as bearing the load and if I could elaborate.

23 The construction which you have proposed with a  
24 structure which supports the shaving head, so there's  
25 already one structure supporting it. And then if you have

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031505a

1 the bracket as an additional projecting support it's really  
2 difficult in some sense there to tell what is the, what is  
3 the cradle structure and what is the bracket, or more  
4 particularly what is providing the support.

5 THE COURT: I don't think so. I suppose it's just  
6 an additional support. I clip my cell phone when I charge  
7 it into something. It rests. I don't think it's got, in my  
8 simplistic mind it doesn't have a bracket on it, I clip it.

9 Now, I've got one of these, I think it uses Rayovac  
10 batteries, one of these flashlights down in my basement.  
11 And it clips into a thing that separates the two batteries  
12 which is rather elegant and I can pull it off the shelf.  
13 Not shelf. I can pull it off the bracket and the batteries  
14 snap together and the light will go on. But it keeps the  
15 batteries from running down. Well, that's just a two-prong  
16 thing and there's a hole in the side of the flashlight, the  
17 prongs go in and separate the batteries. I call that a  
18 bracket. I don't call what I rest my cell phone on a  
19 bracket.

20 MR. SHIMOTA: I guess then the problem with that is  
21 that there is, to my mind, too much ambiguity there. And, I  
22 mean, you could say that where your cell phone rests there  
23 is no bracket therein. I could also envision a circumstance  
24 where any number of experts would come and say the device in  
25 which your cell phone is charged there is some type of

26

1 support there which would constitute a bracket.

2 THE COURT: well, there is a support. But that's  
3 why I like the word projected.

4 Then I've got a, then I've got a phone in another  
Page 22

031505a

5 room where -- well, I guess nothing supports that, it just  
6 sort of stands there upright. But if you needed some  
7 support, if it had an arm around, it came up and grabbed it,  
8 I would call that a bracket.

9 I like, I guess I'm wedded to projecting support.  
10 I'm not hearing anything that, that gives me any definition  
11 of bracket that's any better. Yours is an adequate  
12 definition, it's just too narrow.

13 MR. SHIMOTA: One thing I might propose, your  
14 Honor, with respect to the Rayovac battery definition. If,  
15 for example, the flashlight was connected to a wall, the  
16 bracket --

17 THE COURT: It is.

18 MR. SHIMOTA: -- was fixed into a wall.

19 THE COURT: It is.

20 MR. SHIMOTA: I mean, if that's --

21 THE COURT: That's the whole idea.

22 MR. SHIMOTA: If that's, if that's what you are  
23 thinking of as a bracket as what projects from a wall or  
24 something like a wall, we would be in agreement with that.  
25 But I guess the question then I'm asking is, projecting from

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1 where. If it is projecting from either in the patent as  
2 they talk about a wall mount, either indirectly or directly,  
3 something in a wall, we would, we would agree with that  
4 construction.

5 THE COURT: Well, I don't know that it has to be  
6 projecting from the wall. It could be -- your point is if  
7 you had something that the weight bearing of the shaver, the  
8 head of the shaver was on, I know you don't like the word



031505a

9 cradle, but was on a structure, and just to keep the thing  
10 from wobbling about for whatever reason, it's got an arm  
11 that comes up and supports it, but the weight's on the  
12 structure, you wouldn't, you would read that arm, that arm  
13 couldn't be a bracket.

14 MR. SHIMOTA: No, I would not view that arm as a  
15 bracket.

16 THE COURT: That's all the cradle structure.

17 MR. SHIMOTA: No. Well, it really depends. I  
18 mean, if you look, I guess -- I would, I would say it  
19 depends on what that L-shaped arm is doing.

20 THE COURT: Well, it's supporting it from falling  
21 over if you bump against it or something.

22 MR. SHIMOTA: Well, say, for example, I mean, if  
23 that L-shaped arm was being used for some other purpose, not  
24 for support but for some, maybe charging, at the rear end,  
25 and instead of, and the structure, there were latches or

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1 some kind of, holding the shaving head in the device, so, in  
2 some sense that top portion wasn't providing support, then I  
3 wouldn't say that that is a bracket.

4 THE COURT: Yes, if you have to latch it, I agree  
5 if you have to latch it in that's not a support. And that's  
6 why I like projecting support.

7 However, your point about -- you were so strong  
8 against framework. If I left framework in in my claim 11,  
9 what I'm envisioning as holding the shaver from falling over  
10 would all be part of the framework, what did I say,  
11 framework or structure.

12 Well, for now, until I look at it further, a  
Page 24

031505a

13 bracket is going to be a bracket or projecting support  
14 because I can understand that at least.

15 All right. Anything else on '326?

16 MR. SHIMOTA: I don't believe so, your Honor, from  
17 Rayovac.

18 THE COURT: Let me just see.

19 The clerk reminds me and I was prepared,  
20 permanently open towards the atmosphere, an issue in claim  
21 14. Is this a, is this, is it disputed? You don't seem to  
22 have much of a dispute here.

23 MR. SHIMOTA: No, I think this is one where the  
24 briefing revealed that there really wasn't much of a  
25 dispute. I don't think we disagree on what the atmosphere

29

1 means. And once we know what open --

2 THE COURT: Atmosphere is open air.

3 MR. SHIMOTA: That's what I had always thought, as  
4 long as it's open to the air.

5 MS. WENDLANDT: We agree with that.

6 THE COURT: All right. So that resolves the  
7 matters on '326. And we'll stick with Rayovac to take us  
8 through '556.

9 MR. PALS: Your Honor, I'll be handling these on  
10 the '556 patent.

11 THE COURT: Yes.

12 MR. PALS: We actually have a binder with some  
13 slides in it, if I could hand that up to help with what I  
14 think should be the next point which is cleaning fluid  
15 container.

16 THE COURT: The next point is what?  
Page 25

031505a

17 MR. PALS: I believe the place to go is cleaning  
18 fluid container, your Honor, in claim 1 of the '556 patent  
19 which is at column 11 beginning at line, it looks like line  
20 20.

21 THE COURT: Just a minute. All right. Just --  
22 you're in column 11?

23 MR. PALS: Yes, sir, line 20.

24 THE COURT: Thank you. Just a moment.

25 MR. PALS: Where the cleaning fluid container

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1 phrase first appears in the '556 patent.

2 THE COURT: Yes. A cleaning fluid container  
3 separate from the cradle construction for holding cleaning  
4 fluid.

5 MR. PALS: And, your Honor, we've handed up a  
6 binder entitled Rayovac Corporation's Markman Hearing  
7 Exhibits binder. There are a number of documents in there,  
8 there's a table of contents at the beginning.

9 THE COURT: Yes. Well, how about this.

10 MR. PALS: If we could just look at a couple of  
11 slides because it shows the particular parts of the  
12 disclosure that are relevant to this limitation.

13 THE COURT: But let's work from, let's work from  
14 something though. They propose a container for holding  
15 cleaning fluid separate from the cradle structure. And, I  
16 mean, that's the language of the patent.

17 So, trying to come up with something a little more  
18 understandable, I propose a separate cleaning fluid  
19 container, that is, a cartridge that holds cleaning fluid,  
20 such container or cartridge being separate and separable

031505a

21 from the cradle structure.

22 You're okay with that?

23 MR. PALS: Yes, sir.

24 THE COURT: All right. Now, how about, how about  
25 Braun on that?

31

1 MS. WENDLANDT: Your Honor, we think that limiting  
2 the cleaning fluid container to a cartridge -- I'm sorry,  
3 your Honor, can I ask you to repeat your -- thank you.

4 THE COURT: Of course.

5 I propose this, for the term cleaning fluid  
6 container separate from the cradle structure or holding  
7 cleaning fluid, this: A separate cleaning fluid container,  
8 that is, a cartridge that holds cleaning fluid such  
9 container or cartridge being separate and separable from the  
10 cradle structure.

11 I'm using the term container and cartridge pretty  
12 much indistinguishable.

13 So now what's the matter with that?

14 MS. WENDLANDT: Well, your Honor, a cartridge  
15 denotes something that is --

16 THE COURT: Closed.

17 MS. WENDLANDT: Well, that is closed. And I guess  
18 in the sense, in that sense it would be not such a bad  
19 construction for us. But in terms of -- I mean, there's  
20 nothing in the claim language that requires a cartridge,  
21 it's just a cleaning fluid container that's not the cradle.

22 THE COURT: well, I hear you. But trying to make  
23 sense of this --

24 MS. WENDLANDT: Right.  
Page 27

031505a

25 THE COURT: -- and not trying to limit you, you

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1 know, by the specifications, but reading the specifications,  
2 I mean, you use the word cartridge there in the  
3 specifications.

4 If what you're troubled by is -- when I look --  
5 again, I may be going far afield, but in a simplistic way  
6 when I open the hood to my car now there's various, the  
7 various fluid levels are in various containers. In my car  
8 they're, and this is an advance, they're not, they're  
9 transparent, or roughly transparent in a plastic, so you can  
10 see that your, especially your windshield cleaner is down.  
11 And so you fill it.

12 Now, I don't commonly think of that as a cartridge.  
13 I think of it as a container. But I don't think of, for  
14 example, a trough as a container. I mean, a trough is a  
15 container, but you don't carry things around in a trough. A  
16 trough just holds the fluid for its use. The horse trough  
17 in the western movies, the horses come up and they drink at  
18 the trough. A container, by contradistinction, is -- a five  
19 gallon can is a container.

20 Now, cartridge to me imports something smaller but  
21 also closed. And if I'm going to use it roughly, if I use  
22 cartridge as small container you're all right with that?

23 MS. WENDLANDT: Yes, I would have no problem with  
24 that. The issue I guess I would have with cartridge is that  
25 generally cartridges I think are thought of by the public

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031505a

1 and certainly by the ordinary artisan in mechanical  
2 engineering as something that is replaceable. You throw it  
3 away after one use. which is why Rayovac --

4 THE COURT: I see. Like your, like your ink  
5 cartridge or the cartridge in a loaded round of ammunition,  
6 the cartridge is expelled and then --

7 MS. WENDLANDT: That's right. And so to the extent  
8 there was a connotation that the container had to be one  
9 that was replaceable by use of a cartridge, we would be, we  
10 would say that there's actually no support for that in the  
11 claim itself.

12 THE COURT: For the use of the word cartridge. No,  
13 I think there's something to that. But I want to hear him.

14 But let's try and modify it and see -- it means --  
15 let me try this now. A separate, a separate cleaning fluid  
16 container, that is, a container that holds cleaning fluid  
17 which container is separate and separable from the cradle  
18 structure.

19 Now, you're okay with that?

20 MS. WENDLANDT: Yes, your Honor.

21 THE COURT: How about Rayovac, are you okay with  
22 that?

23 MR. PALS: No, we're not, your Honor.

24 THE COURT: Okay. Where am I going awry here?

25 MR. PALS: The '556 patent is extremely specific

34

1 about what a cleaning fluid container is. And what it says  
2 it is is a removable and replaceable cartridge. It is  
3 crystal clear. If you look at Figure 1 of the '556 patent  
4 you will see as number 65, it's down in the lower right hand